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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 856

CARL A. VERGARI, District Attorney of Westchester County, New York,

Petitioner,

AGAINST

208 CINEMA, INC. and PHILIP STEINBERG,

Respondents,

AND

ERIC GELDART, Police Chief of the Village of Port Chester, New York,

Respondent.

BRIEF ON BEHALF OF THE STATE OF GEORGIA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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This brief in support of the Petition for Writ of Certiorari is filed by the State of Georgia pursuant to Rule 42(4) of the Rules of this Court.

INTEREST OF AMICUS CURIAE

Aside from the interest of every State (including its judges, prosecutors, and concerned citizens) in ascertaining the status of the law of obscenity, the specific

interest of this Amicus Curiae is to point out one facet of the obscenity problem in the hope of averting a collision of the First and Fifth Amendments. Such a collision would allow hardcore pornographic movies to circulate freely underground, immune from law and legal process, and would allow obscene movies to be shown in neighborhood and drive-in theaters across the nation.

SUMMARY OF ARGUMENT

The Court below has held that the Constitution requires an adversary hearing before seizure of a movie film (Appendix to Petition for Certiorari, p. 28). Now, and unless this Court grants certiorari and reverses, whenever courts seek to hold such hearings as to hardcore pornographic movies, the possessors of such films will refuse to produce and permit the showing of those films, asserting their rights not to incriminate themselves.

The shelter of the First Amendment should not be extended over pornographers to the point where they can step freely under the protection of the Fifth Amendment, and thereby escape the law.

ARGUMENT

In *State v. Koohy*, 250 A.2d 711 (R.I. 1969), the defendant was charged with the commercial exhibition of obscene movies to three minors. The evidence showed that the boys were all 15, that the movies were shown to them in the back hallway at defendant's restaurant at times when the restaurant was closed. Defendant's conviction was reversed because there was no evidence that the showing was done commercially. Obviously the showing of those obscene movies to those young boys was

not done for commercial purposes, but the point is this: How can a State ever have a prior adversary hearing as to obscene movies shown privately to young boys in the back hallway of a business which is closed?

Presumably the offense in the *Koohy* case was discovered when the parents of one or more of the boys learned of their experience. The parents probably went to the police and were referred to the prosecuting attorney. Is he to be required to seek a prior adversary hearing before he can charge the defendant with showing an obscene movie to minors? If so, the prosecutor's hands will be tied, because the defendant will refuse to produce the movie, relying on the Fifth Amendment. See *Boyd v. United States,* 116 U. S. 616 (1886).

Today, there are all sorts of motion pictures. There are Hollywood movies and foreign films, shown in theaters. There are movies produced by the avant-garde. There are amateur movies and home movies. And there are "stag" movies, "underground" movies, and foreign films, even shown commercially but not in theaters. They are shown in fraternity houses, in private clubrooms, and in basements.

It does not appear to us to be a fair basis of distinction to say that Hollywood's commercial movies are entitled to constitutional protection not afforded low-budget and amateur movies. Movies are movies, whether produced by Hollywood or by hippies.

Suppose the daughter of the prosecuting attorney were to see a stag film at a fraternity house. Her father would be helpless if there had to be a prior adversary hearing as to obscenity before he could stop the showing of the film. He might request that the local distributor of stag

films make it available for the hearing, but the distributor could refuse to produce it, relying on the Fifth Amendment. If there had to be a prior hearing, such films could circulate freely underground, protected on the one side by the Fifth and on the other by the prior hearing rule.

If a single movie film cannot be seized, in conjunction with a lawful arrest, without a prior adversary hearing, underground pornographers will be free to circulate their filth. Such circulation would provide lechers with the stimulants with which to debauch minors.

Similarly, commercial movie exhibitors undoubtedly will decline to produce obscene films at the adversary hearing, relying upon the Fifth Amendment.

The Court below erred in holding that obscene movies are entitled to an adversary hearing prior to seizure, and that a print can be made available to the prosecution (Appendix to Petition for Certiorari, pp. 28, 29). The Court below has created a Fifth Amendment loophole for obscenity which will, unless reversed, render null and void this Court's decision in *Roth v. United States*, 354 U.S. 476 (1957).

The Court below erred in holding that the decision in *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), is applicable to motion pictures. In *Ginzburg v. United States*, 383 U.S. 463 (1966), and *Mishkin v. New York*, 383 U.S. 502 (1966), both affirming criminal obscenity convictions after *A Quantity of Books v. Kansas, supra*, no suggestion was made by the Court that *Books* prohibited a criminal proceeding, and seizure of the obscene materials, where there had been no prior adversary hearing. In *Mishkin*, the majority opinion distinguished *Books*

on the ground that there was no showing as to how many of the total available copies of the *Mishkin* books had been seized (383 U.S. at 513) and on the ground that the Kansas statute created a book burning procedure (383 U.S. at 512, fn. 12). Thus, the Court emphasized that *Books v. Kansas* was based on the mass seizure and book burning aspects of that case.

In *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636 (1968), the Court had the opportunity to apply *Books v. Kansas* to the seizure of a film, but instead it cited *Marcus v. Search Warrant,* 367 U.S. 717 (1961), thereby withholding the application of the "prior adversary hearing" rule from motion picture films.

The Court below erred, we respectfully submit, in extending *Books v. Kansas* to include the single seizure of a motion picture film in conjunction with the initiation of a criminal prosecution. It erred in creating a conflict between the First and Fifth Amendments, which conflict can be resolved only by this Court.

CONCLUSION

To prevent hardcore pornographic movies from circulating freely under the protection of the Fifth Amendment, the prior adversary hearing rule should not be extended to movies. It is submitted that the petition for certiorari should be granted, and the decision of the Second Circuit Court of Appeals should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, Harold N. Hill, Jr., Executive Assistant Attorney General of the State of Georgia, hereby certify that I am of counsel for the Amicus Curiae, that I am a member of the Bar of the Supreme Court of the United States, and that on January ___, 1970, I served the within and foregoing Brief on Behalf of the State of Georgia as Amicus Curiae in Support of Petition for Certiorari upon the parties to said cause by mailing true typed copies thereof to their attorneys of record, Kunstler & Kunstler, 511 Fifth Avenue, New York, New York, and Carl A. Vergari, District Attorney, County of Westchester, Court House, White Plains, New York, 10601, their last known addresses, postage prepaid.

This ..... day of January, 1970.

HAROLD N. HILL, JR.
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